In the Supreme Court of the United States.

IN ERROR.

JOSEPH SHIELDS

vs.

THE STATE OF OHIO.

No. 638. Advanced on the Docket.

BRIEF FOR DEFENDANT IN ERROR.

BY

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In error to the Supreme Court of the State of Ohio.

MATERIAL FACTS AND STATUTES.

1. "The Junction Railroad Company" was chartered 2d of March, 1846. (See Rec., pp. 10–14.)

"The Toledo, Norwalk and Cleveland Railroad Company" was chartered March 7th, 1850, and charter was amended January 20th, 1851. (See Rec., 14 to 19.)

These two companies consolidated and formed the "Cleveland and Toledo Company," (R., p. 6,) this consolidation being effected under the acts of March 3d, 1851, and of January 20th, 1851: (Rec., pp. 15 and 19, and Rec., pp. 7 and 10, also Rec., p. 6;) so that the "Junction Company" and "Toledo, Norwalk and Cleveland Company," in 1853, united to form "the Cleveland and Toledo Company." This "Cleveland and Toledo Railroad Company," thus formed, afterwards, and by the agreement on page 19 of Record, on 11th of February, 1869, consolidated with the "Lake Shore Railway Company" and formed the Lake Shore Railroad Company. (R., pp. 19–21.)

But it would seem that on the 6th of April, 1869, this same Lake Shore Railway (not railroad) Company (which, on the 11th of February, 1869, had consolidated with the C. and T. R. R. Co.,) consolidated with "the Michigan Southern and North Indiana R. R. Co.," and thus formed "THE

LAKE SHORE AND MICHIGAN SOUTHERN R. R. COMPANY." (R. 23.) Of this last plaintiff in error was conductor.

There would seem to be mistakes in this printed record; and its "exhibits" and "bill of exceptions" seem to trace the Junction charter, first, into the "Cleveland and Toledo Company," then from the Cleveland and Toledo Company it passes into the "Lake Shore Rail*road* Company," (Rec., 19;) and there it seems to be left, so far as these exhibits and the bill of exceptions show; for it is the "Lake Shore Rail*way* Company," and not the "Lake Shore Rail*road* Company," which consolidates with the Michigan Southern and North Indiana Company, and which last two named, on the 6th of April, 1869, (Rec., 23,) united to form the "Lake Shore and Michigan Southern Company," of which plaintiff in error was conductor. Perhaps there is some explanation of all this which we have overlooked, and which the court will detect.

The consolidation by which the "Lake Shore and Michigan Southern Railroad Company was formed was done in pursuance of the act of April 10th, 1856, (Rec., 53,) which is named below.

2. Said plaintiff in error, on trial of indictment for an assault and battery, alleged to have been committed by him, in forcibly ejecting a passenger going from Elyria to Cleveland (being part of said line, made and chartered by said Junction Company) for refusing to pay, in excess of three cents per mile, fare demanded by such conductor, defended such ejectment on the ground that it was the right of such Junction road, and also of its successor, "the said Lake Shore and Michigan Southern Railroad Company," to demand the said fare in excess of three cents, and to eject, as was done, on its refusal; and claimed in such defence that the act below named, of April 25th, 1873, as applied to said last named Company, was unconstitutional, in so far as it attempted to prohibit the taking of fare in excess of three cents. (See Bill of Exceptions, Record 5 and 6.)

3. But the court refused this defence, and charged the jury that the said Cleveland and Toledo Company, so formed out of the Toledo, Newalk and Cleveland Company, was subject to all the restrictions contained in the acts making the charter of the Company so consolidated; that one of these restrictions was power in the State to reduce the fare as per section 22 of said Junction charter, (Rec., 14;) that the effect of that consolidation, which formed the Lake Shore and Michigan Southern Company, under said agreements and laws enacted under the present constitution of Ohio, was to create a *new* corporation subject to such new constitution, which *new* corporation could not have transferred to it from old corporations franchises or privileges incapable of being bestowed by general laws; that under such constitution the legislature could not grant to any company the power to fix rates of fare not subject to reduction or regulation by law; and therefore the Lake Shore and Michigan Southern Company could not, under its said present organization, avail itself of the power conferred by the 11th section (Rec., 12) of the Junction charter, to wit, to "*receive such rates of toll as the corporation may think reasonable;*" that the act of April 25th, 1873, limiting the right of companies to three cents a mile for distances over eight miles, was applicable to the Lake Shore and Michigan Southern company, and that the jury's duty would be discharged by rendering a verdict of guilty against the defendant. (Rec., 7.)

4. Under this charge there was a verdict of guilty, (Rec., 4,) a motion for new trial, (Rec., 4,) which was overruled and exceptions, (Rec., 4,) and judgment, (Rec., 5;) and, on error, the Supreme Court of Ohio affirmed said judgment, (Rec., 52 and 53;) and in rendering such judgment of affirmance the court causes to be certified how and what federal question arose and was decided. (Rec., 52 and 53.) This "federal question" is there stated in various forms; but all in substance amounting to this, to wit: that as the court held the said consolidation by which the Lake Shore

and Michigan Southern Company was formed was made under the act of 10th April, 1856, (53 O. L., 143,) and since the said company acquired, as to the said part of the line made by the said Junction Company, the right to charge fare *ad libitum*, in virtue of section 11 of said Junction charter, (Rec., 12,) and as this right was, in virtue of section 12 of act of 20th January, 1851, (Rec., 18,) and of section 5 of act of April 10, 1856, (53 O. L., 143,) transferred to the "Lake Shore and Michigan Southern Company," therefore such right to charge and receive such rates of fare on said part of said line so made by the Junction Company, as such L. S. and S. M. Company might deem reasonable, (Record 12) was a part of the contract or charter rights of such last-named company; and that the said act of 25th of April, 1873, (70 O. L., 161,) wherein it enacts that "Any corporation, operating a railroad in whole or in part in this State may demand and receive for transportation of passengers on said road not exceeding three cents per mile," &c., impairs the obligations of said contract of said State with said company, and is void as being repugnant to article 1, section 10, of the Constitution of the United States.

STATUTES.

The following are the material sections, or parts of sections, of the Ohio statutes which enter into this case:

Section 11 of the Junction Railroad Company, charter (44, O. L., 284,) provides: "That said corporation may demand and receive from all persons travelling upon said road, "or for the transportation of property, such rates of toll as "the said corporation may think reasonable, which rates shall "have been posted up in some public place at each of the "depots." (Record 12.)

Section 22, of same act, is in these words:

"After the lapse of ten years from the completion of said "road the State shall have power to reduce the tolls upon said road, should they be unreasonably high, and exercise the "same power at intervals of every ten years thereafter."

The material part of section 12, of act of 20th of January, 1851, (49 O. L., 460, Rec. 18,) is in these words: "And in case the railroad company with which the Toledo, Norwalk and Cleveland Railroad Company shall consolidate its stock shall be the Junction Railroad Company, incorporated by an act of the legislature passed March 2, 1846, sections 9, 10, 11, 15, and 17 of the act last aforesaid (which sections see Record, pages 12 and 13) shall continue to form a part of the law by which said consolidated company shall be governed; but in other respects said consolidated company shall be governed by the laws applicable to The Toledo Norwalk and Cleveland Railroad Company and the acts amendatory thereto."

The material part of section 1 of act of 3d of March, 1851, (49 O. L., 94; Record, page 8) is in these words: "And "such new corporation shall possess all the powers, right, and "franchises, conferred upon such two or more corporations "by the several acts incorporating the same or relating there- "to, respectively; and shall be subject to all the restrictions "and perform all the duties imposed by such acts, so far as "the same may be consistent with the provisions of this act."

This act is one of a general nature, providing for consolidation of roads in Ohio.

The following are the most material parts of the act of April 10, 1856, (53 O. L., 143; Swan and Cretch, 327,) authorizing Ohio roads to consolidate with companies in other States, being the act under which the Lake Shore and Michigan Southern was organized:

SEC. 1. "It shall be lawful for any railroad company in "this State, organized under the general or *any special* law, "or which may be hereafter organized in this State," * * * "to consolidate its capital stock with the capital stock of "any railroad in an adjoining State," &c.

Section 3 is as follows: "Upon the making and perfecting "the agreement and act as provided in the preceding section "and filing the same, or a copy, with the Secretary of State,

"the several corporations, parties thereto, shall be deemed "and taken to be one corporation, possessing within this State "all the rights, privileges, and franchises, and subject to all "the restrictions, disabilities, and duties of such corporation "of this State so consolidated."

Sections 4, 5, 6, and 7 all expressly speak of and deal with such consolidated corporation as one corporation—as a *new* corporation—having one directory, with consolidated stock, and as constituting under the laws of Ohio but one and a new artificial person.

Section 7 is in these words: "Suits may be brought and "maintained against such new company in the courts of this "State for all causes of action, in the same manner as against "other railroad companies in this State."

The 1st section of the act of 25th of April, 1873, (70 O. L., 161,) which the plaintiff's assignment of errors (Record 57) says is in violation of the contract rights of said Junction Company and its successors, is in these words:

"SEC. 1. Be it enacted, &c., that section 13, of the above "mentioned act, be amended so as to read as follows:

"SEC. 13. Such corporation, *or any corporation operating a "railroad in whole or in part in this State*, may demand and "receive for the transportation of passengers on said road "not exceeding three cents per mile for a distance of more "than eight miles; and for the transportation of property "not exceeding five cents per ton per mile, when the same is "transported a distance of thirty miles or more," &c.

Section 2, article 13 of the constitution of Ohio, which has been in force since September, 1851, provides, "That corpo- "rations may be formed under general laws; but such laws "may, from time to time, be altered or repealed." And section 2 of article 1 of same constitution provides that, "No "special privileges or immunities shall ever be granted that "may not be altered, revoked, or repealed by the general as- "sembly."

BRIEF.

The error assigned by the plaintiff upon these facts of record (see Brief, p. 4) is "That the Supreme Court of Ohio "erred in deciding that the said act passed April 25, "1873, in so far as it prohibited the Lake Shore and Michi-"gan Southern Railway Company, notwithstanding the pro-"visions of the charter of said Junction Railroad Company, "or those incorporated into the Cleveland and Toledo Rail-"road Company, (which Company by consolidation under the "act of April 10, 1856, was merged into the Lake Shore "and Michigan Southern Company,) was of binding force "and validity against the said consolidated company, and "not repugnant to the Constitution of the United States, or "to article 1 and section 10 of the same."

POINTS INVOLVED.

It will be seen by this recital of the facts of the record, and a perusal of the plaintiff's argument, that this inquiry is confined to two points, to wit:

(1) Under all the facts and statutes affecting the organization of "the Lake Shore and the Michigan Southern Railroad Company," as such organization was accomplished by the contract of April 6, 1869, (Record 23) and under the statute of April 10, 1856, did said Lake Shore and Michigan Southern Railroad Company take whatever franchises it did acquire, subject to the same powers of legislative modification, &c., as corporations are subject to, which are organized under the general corporation act of 1852.

(2) If it be so subject to modification, whether such power of modification reaches so far as to allow the act of 1873 to take away the unlimited right to take tolls, which is claimed by said Company under said 11th section of the said Junction charter.

To the answer of these two inquiries, we address the suggestions which follow.

STATE'S INTERPRETATION OF ITS OWN LOCAL LAWS FINAL.

Our first proposition is, that since the record shows the fact undisputed, that, voluntarily, in 1869, the Ohio companies which united to form this "Lake Shore and Michigan Southern Railroad Company" by act of both their stockholders and directors, accepted the provisions of the act of April 10, 1856, and organized a corporation thereunder, the question whether this fact constitutes these persons so acting a new corporation, subject to the individual liability for debts of the corporation—as provided by section 3, article 13 of constitution of 1851, and to the other provisions of that constitution—is a question of Ohio law with which no federal question is mixed up, and is one as to which this court will follow the Ohio decisions. This being a question arising on a local or state constitution and statute, and involving a rule of property, this court will adopt the construction which has been given by the highest judicial tribunal of the State. This familiar rule established in the immense array of cases collected in Cooley, note 1, p. 13, has received from this court its application to cases like the present to wit, to cases where the question was whether certain acts and facts created a corporation under and by State laws? Of this class is Nesmuth et al *vs.* Shelden, 7 Howard 812; Hartford *vs.* Hartford Bridge Co., 10 Howard 511; Pennsylvania College cases, 13 Wall 212; Sherman *vs.* Smith, 1 Black 594.

Whether this consolidation under the Ohio constitution and the said statutes results in a *new* corporation does not depend, as in Olcott *vs.* Supervisors (16 Wall. 689) and Venice *vs.* Murdock (2 Otto, 501) upon general principles of law, but does depend simply and purely upon the construction of the constitution of laws of Ohio. Whether such be the effect or not must depend upon the statute under which the consolidation takes place, and on the intention therein manifest. Central R. R. *vs.* Georgia, (2 Otto, 670.)

Therefore when the case of Shields *vs.* Ohio, 26 Ohio State

R. 86, decides what is there decided, it determines finally so much of this case as depends on the question whether the "Lake Shore and Michigan Southern Railroad Company is a *new* corporation organized under the constitution of 1851.

What this case of Shields *vs.* Ohio decides on this point is, with exact accuracy, expressed in the following words from the syllabus:

"Consolidated railroad companies organized in pursuance "of the act of April 10, 1856, (4 Curwin, 2,791,) are corpora- "tions formed under a general law within the meaning of "article 13, section 2 of the constitution of 1851, and as such are subject to the limitations and reservations contained in "that section and in article 1, section 2, of that instrument."

Precisely the same thing is decided in Ohio *ex relatione* Sherman 22 Ohio, St. R. 411.

IF FEDERAL QUESTION EXISTED IT WAS RIGHTLY DECIDED.

But assume that a federal question is mixed up with the question decided in Shields *vs.* Ohio, when it holds the Lake Shore and Michigan Southern a new comporation under Ohio laws and one subject to the constitution of 1851, and that this court may reverse Ohio on that point, then we enquire next whether Ohio has rightly construed her own laws in holding as just stated.

That the supreme court of Ohio rightly deceded we establish by the following considerations.

CONSOLIDATION UNDER OHIO LAWS WORKS A NEW CORPORATION.

(1) Under statutes of Indiana, in every particular affecting this case identical with the statutes of Ohio under which this L. S. & M. S. R. R. Co., was formed, this court in Clearwater *vs.* Meredith, 1 Wall, 25–40, held precisely as the Ohio court held in this case, to wit, that the consolidation under such statute works a destruction of the old, and creation of a new corporation subject to the new laws under which it was created. On page 40 and in approval of McMahon *vs.* Morrison 16 Ind. 172, this court uses these words:

"By virtue of this act the consolidations in the plea stated "were made. Clearwater, before the consolidation, was a

"stockholder in one corporation created for a given purpose; after it he was a stockholder in another *and different corporation* with other privileges, powers, franchises and stockholders. The effect of the consolidation was a dissolution of the three corporations, and at the same instant the creation of a new corporation with property, liabilities and stockholders derived from those passing out of existence." McMahon *vs.* Morrison, 16 Ind. 172.

(2) In Tomlinson *vs.* Branch, 15 Wall 465, this court was dealing with the question as to what was the effect of a consolidation of several corporations under laws of South Carolina upon the franchises of consolidated corporations. When it came to the point we are now upon, to-wit, whether the consolidation works an extinguishment of the old franchise of the "right to be," or of the existence of the old corporation and the creation of a *new* one, the court uses this explicit and unmistakable language: "Of course these remarks do not apply "to those corporate rights and franchises of the old corporation *which appertain to its existence and functions as a corporation. These became merged and extinct.*"

(3) The force of reason, independently of its authority, which is embodied in the unanimous opinion of the Supreme Court of Ohio in Shields *vs.* Ohio is quite irresistable on this point, and establishes that it has rightly construed its own laws.

"The court there says (page 92) "the statute (of April 10, "1856,) plainly contemplates and expressly provides for the "formation of a new corporation. The old stock is to be "surrendered or extinguished; a new amount of capital stock "is to be agreed upon, and distributed to parties who voluntarily take the same; and a certificate is to be filed with "the Secretary of State, which it is declared shall be evidence "of the existence of such corporation. Section 3 of the act "declares that the companies thus uniting shall be taken and "deemed to be one corporation. Section 5 provides for the "election of a board of directors of the new corporation, "which it denominates a corporation created by the consolida-

"tion and by the provisions of that act, and vests in such "new corporation, all and singular, the rights and franchises "of the *former* corporation. Nothing could be much plainer, "it seems to us, than that a consolidated company organized "under such a statute is a corporation formed under a gene- "ral law within the meaning of Art. 13, Sec. 2 of the present "Constitution, and as such liable to all the limitations and "restrictions therein, equally as corporations organized under "the general corporation laws of the State, enacted under the "present Constitution."

(4) The brief of the plaintiff virtually concedes (as on page 9) that the Lake Shore and Michigan Southern is a new corporation organized under the Constitution of 1851, but insists that though so organized, yet it inherited from the Junction Company's 11th Section (R. 11) the *ad libitum* right to fix all tolls, which the legislature could not take away.

(5) The case of Central Railroad Company *vs.* Georgia, 2 Otto 670, when it declares that "whether a legislative act of consolidation of two corporations has the effect of creating a new corporation *must depend upon the statute under which the consolidation takes place, and the intention therein manifested*" is equally conclusive of the creation of new corporations whenever the organization occurs under an act wherein the intention to create *new* corporations by the consolidation is manifested as plainly as it it is by this act of April 10, 1856. In addition to the conclusive reasons above quoted from Shields *vs.* Ohio, showing the legislative intent to be the creation of *new* corporations under this act, such intent to create new corporations is conclusively fixed on the very face of the act by the fact that in Sections 2, 4, 5, 6 and 7 the act expressly declares these consolidated corporations to be *new* ones. (See also Delaware Railroad tax case, 18 Wall. 227 and 228.)

It is plainly impossible to resist the propsition, therefore that the owners and stockholders in the companies out of which this "Lake Shore and Southern Michigan Company" was formed did *voluntarily and absolutely* surrender the old

charters of such companies so consolidated; and did voluntarily contract with the State of Ohio to accept, and did accept, a new charter under the constitution and laws of Ohio, made in and since 1851; and did voluntarily contract with Ohio to accept, and did accept, whatever legal consequences flow from surrendering such old charters and accepting such new charter under such new constitution and laws.

LEGAL CONSEQUENCES OF TAKING OUT A NEW CHARTER, UNDER ACT OF 1856.

We are therefore brought to the only remaining question in the case, to-wit, what are the legal consequences of such voluntary agreement to accept this new charter, upon this alleged exemption from control by the Legislature over the rates of fare?

The answer to this is, that such acceptance in 1869 of this new charter creates—as between this Lake Shore and Michigan Southern Company and all its stockholders, of the one part, and the State of Ohio, of the other part—a new agreement that this new charter shall be held subject to such powers in the Legislature over and in regard to it as the constitution and laws of Ohio, in force at the time the new charter was was created, declared all such corporations should be subject to; among which powers so held by the Legislature is the power in question of regulating the rates of fare on this road.

That such became the power of the Legislature on this new corporation we establish by the following considerations:

(1) By the authority and logic of the Supreme Court of Ohio in this same case of Shields *vs.* Ohio, 26 O. S., R. 93, where the court say: "But it is agreed, if we understand "counsel, that the consolidated company has the right to fix "any rates of fare for passage which it deems proper over the "old line of the Junction Road because the original company "had that right, and because all its franchises and rights "have been transferred to the consolidated company. That "argument would have been good before the passage of the

"act of 1873, or some other act, limiting or modifying that "right. This right to take unlimited rates of fare, or to "take specific rates of fare, is no more exempt from legisla- "tive control and atteration than it would have been had the "company been formed under the general corporation law of "1852, or under any other general law enacted since the "adoption of the present constitution. *All* the rights and "franchises of the company—this right to make and take "rates of fare among the rest—were derived to the company "under and by virtue of the act 1856, and they are all alike "subject irrespective of the rights of the old corporations to "the legislative power of alteration, amendment and repeal."

"But counsel argue, or seem to argue, that the Legislature "have no power to alter or regulate the rates of fare allowed "to corporations organized under the present constitution. "The claim seems to be that section 2 of article 13 of the "Constitution merely reserves to the Legislature the power "to prevent the organization of new companies under the "law, by repealing or changing it, and that corporations or- "ganized under it before the repeal or change are beyond "the legislative control equally as though no such provision "had been inserted in the Constitution."

We by no means assent to such a proposition. This sec- "tion of the Constitution is to be construed in connection "with section 2 of article 1, which declares 'that no special "privileges or immunities shall ever be granted that may "not be altered, revoked, or repealed by the General As- "sembly."

"We have no hesitation in saying that the right in ques- "tion comes under these provisions. The two sections, "taken together, most clearly reserve the legislative power "in question. The power to repeal the law, and thereby "prevent the formation of future corporations under it, ex- "isted under the old Constitution. If counsel are right in "their claim, then these provisions of the present Constitution "mean nothing or affect nothing."

(2) Amongst the other points, conclusive of this whole case, which this reasoning of the court establishes, we, in this immediate connection, beg attention to the important error exhibited, on the 10th page of the opposing brief, which declares that, besides sections 1 and 2 of the 13th article of the Constitution of Ohio, no *other* provision of said Constitution affects the question of the power to regulate these fares. This statement, and the entire brief, carefully ignores the 2d section of the 1st article of the Constitution, here commented upon by the court; which carefully and explicitly prohibits and renders impossible the grant of any "special privileges" which may not "*be altered, revoked, or repealed*" by the Legislature.

The plaintiff in error says the Legislature has, by the act of April 10th, 1856, transferred to his road the "special privilege" of taking toll *ad libitum*, which no Legislature can "alter, revoke, or repeal." But the Constitution, in this clause, in language wholly incapable of misconstruction, says no special privileges or immunities shall ever be granted that may may not be altered, revoked, or repealed by the General Assembly. Then it duplicates this provision in the 1st section of article 13, prohibiting the conferring of any corporate powers, by a special act; then it triplicates the prohibition by providing, in section 2, article 13, that "corporations may be formed under general laws; but all such "laws may, from time to time, be altered or repealed."

(3) Next we find the same thing which is here so forcibly reasoned in Shields *vs.* Ohio, decided in this court, in repeated cases.

In Pennsylvania College Cases, 13 Wall., 190–213, this court carefully state the general proposition we are now upon, in these words: "Such a power also—that is, the "power to alter, modify, or repeal an act of incorporation— "is frequently reserved to the State by a general law appli- "cable to all acts of incorporation, or to certain classes of the "same, as the case may be; in which case it is equally clear

"that the power may be exercised whenever it appears that "the act of incorporation is one which falls within the reser- "vation, and the charter was granted subsequent to the "passage of the general law, even though the charter con- "tains no such condition, nor any allusion to such reserva- "tion."

The court then cites the authorities upon this proposition, and also upon the further one there stated, that, even where there was *no* power to alter, &c., but the act making alterations is passed by assent of the stockholders, or they accept it, then the act does not impair the obligation of any contract; and the court then proceeds further to hold that, because the charter of Jefferson College had in it a clause declaring that it "should *not be altered or alterable by any ordinance or law of said trustees, or in any other manner than by act of the Legislature;*" and because, moreover, that when, in 1865 and 1869, certain acts were passed consolidating two corporations, (made in 1802 and 1806,) and bringing their property and schools and scholarships "closely" into one corporation, the Constitution of Pennsylvania of 1857 provided that charters might be "altered, revoked, or annuled," therefore these acts of 1865 and 1869 did not impair any contract right of either corporation or any scholarship holder.

So in Miller *vs.* The State, 15 Wall., 478, where the power reserved to the State of New York by its constitution and laws was substantially the same as the Ohio constitution and laws which are involved in the present case. (See 15 Wall., 492 and 493.) And where the legislature had undertaken to alter a railroad charter so as to radically change the voting and governing power of two specific classes of stock, and so to change such voting power as to give the government to the stock of the city of Rochester, whereas the original charter gave the city but [redacted] votes out of thirteen, this court held such change of charter legal, owing to this reserved power of amendment, and the court re-announces in the same

words the law we have above quoted from the Pennsylvania College cases.

Holyoke Company *vs.* Lyman, 15 Wall., 512, contains precisely the same law, and brings into view an additional element always applicable when a corporation is claiming, in virtue of its charter, some exemption from the ordinary powers of legislation. This additional element is applicable to the case at bar, and is stated in these words by the court: "Repeated decisions of this court have established the rule "that whenever privileges are granted to a corporation, and "the grant comes under revision in the courts, such privileges "are to be strictly construed against the corporation and in "favor of the public; and that nothing passes but what is "granted in clear and explicit terms." (1 Black, 380; 11 Peters, 544.) "Whatever is not unequivocally granted in "such acts is taken to be withheld, as all acts of incorporation, and acts extending the privileges of corporate bodies, "are to be taken most strongly against the corporations." See also Delaware Railroad Tax, 18 Wall., 225. And see also Commissioners *vs.* Holyoke, 104 Mass., 449.

We have referred to these recent cases on this point, not because there is any uncertainty or doubt as to the present condition of the law bearing upon this important question of the powers of the government over such franchises of these public corporations as the one in question, to wit, those affecting the commerce and interests of the public and of the State. But our reference to the cases has been in order to have fixed in the case, upon impregnable authority, an exact formula or statement of the foundation proposition upon which, as we think, rests this case. This proposition we restate in the words of this court: "Public grants are strictly "construed. Nothing can be taken against the State by pre-"sumption or inference," (18 Wall., 225;) and "such a power "also, that is, the power to alter, modify, or repeal an act of "incorporation is frequently reserved to the State by a general "law applicable to all acts of incorporation, or to certain classes "of the same, as the case may be, in which case it is equally

"clear that the power" to alter, modify, or repeal "may be "exercised whenever it appears that the act of incorporation "is one which falls within the reservation, and that the "charter was granted subsequent to the passage of the gen- "eral law, even though the charter contains no such condi- "tion nor any allusion to such a reservation."

CREATION OF CORPORATIONS, EXEMPT FROM MODIFYING LEGISLATION, IMPOSSIBLE SINCE 1851.

It being now established, as seems to us, that this corporation is one as to which the State has reserved to itself the power to "alter, revoke, modify, or repeal" the franchises so granted in 1869, the only possible inquiry left is whether this most important public or governmental power, so vitally affecting all the people, to wit, the power to prevent excessive taxation upon the intercourse and commerce of the country through its highways, has been surrendered by the State to this corporation? In other words, has the State given to this company, as vested property incapable of withdrawal, the right, or franchise, to tax its transportation *ad libitum?*

If such a franchise was in fact granted to this new corporation so created in 1869, under the constitution of 1851, and the general laws of Ohio, and if this corporation, unlike all others created since the constitution of 1851 and act of 1852 were made, owns, as property, the exemption and immunity by which it can tax commerce at its pleasure, and can defy the legislature and the Congress, which holds the power to "regulate commerce among the several States," then it will not be denied that "before any such exemption or limitation can be admitted, the intent of the legislature to confer the immunity or prescribe the limitation must be clear *beyond a reasonable doubt.*" (Words of this court in Del. R. R. Tax, 18 Wall., 225.)

Now we affirm that instead of its being "clear beyond a reasonable doubt" that the laws of Ohio have so bestowed

this sort of a grant on this new corporation of 1869, it is clear beyond a doubt that the constitution and legislature have carefully withheld it. To the provisions of law showing this withholding we will presently allude; and will now allude to what is so strenuously insisted in the opposing brief, to wit, that even if this Lake Shore and Michigan Southern Company be a new corporation organized in 1859, still it owns the franchise to fix tolls *ad libitum* as an inheritance from the charters of the consolidated companies; and this, being property, is incapable of being stricken down by an act of legislation.

Having shown that this L. S. and M. S. Company is, like every other Ohio corporation, subject to every reserved right of legislation to which Ohio roads are subjected since 1852, we are of course brought, by this position of the other side, to the direct, naked, and most momentous question, whether power in the State to regulate the tax imposed by the common carriers of the country upon the commerce of the country, in the shape of tolls, fares, and the like, is a reserved power, kept back by the State, when such State has, by her Constitution, expressly reserved all that is implied in these provisions, to wit:

"And no special privileges or immunities shall ever be "granted that may not be altered, revoked, or repealed by "the General Assembly." Article 1, section 2.

"The General Assembly shall pass no special act conferring corporate powers." Article 13, section 1.

"Corporations may be formed under general laws; but "such laws may, from time to time, be altered or repealed." Article 13, section 2.

It seems to us that, whether this question be considered in its aspects as presenting merely a question of contract or charter rights, or be considered, as it must be, as one in which enters also the questions as to the legal effect, upon the case, of the public relations of such public corporations to the people and the State; in either and each view of it the true answer to it is indicated in the following language of this court in Olcott *vs.* The Supervisors, 16 Wall, 694:

"But is the construction of a railroad by a company in-
"corporated by a State for the purpose of building it, and
"endowed with the State's right of eminent domain, a thing
"in which the State has, as such, no interest? *That the*
"*Legislature of Wisconsin may alter or repeal the charter*
"*granted to the Sheboygan and Fon du Lac Railroad Company*
"*is certain. That is a power reserved by the Constitution. The*
"*railroad can therefore be controled and regulated by the State.*
"*Its use can be defined; its* TOLLS AND RATES FOR TRANSPORTA-
"TION MAY BE LIMITED. Is a work made by authority of the
"State, subject thus to its regulation, and having for its ob-
"ject an increase of public convenience, to be regarded as
"ordinary private property?"

In this sentence, from this court, declaring that, when, as is true in the case at bar, the power to alter and revoke charters is reserved in the Constitution, the railroad's "use can be de-
"fined by the Legislature—its tolls and rates for transporta-
"tion may be limited," is accurately declared (if it does not authoritatively settle and decide) the law of the case at bar.

The whole argument on the other side is that this franchise to take tolls at pleasure, is now, by contract, the vested property of this Company, and is beyond the power of the Ohio laws. This court here says: "Not so. You are a
"public corporation—public in such high sense as to be en-
"dowed with some of the highest elements of State sover-
"eignty, by the right of public domain; so public as that the
"State may tax all the people to make your road; so public
"that the Constitution has reserved the right to modify or
"abolish *all* your franchises; so public as that you are created
"for the sole purpose of carrying on that 'commerce among
"the several States,' which has such pre-eminently public
"importance and qualities as to induce the Federal Consti-
"tution to withhold from the States and bestow upon the
"nation its paramount regulation; and being so public 'the
"railroad can therefore be controlled and regulated by the
"State. Its use can be defined; *its tolls and rates for trans-*
"*portation may be limited.*'"

This statement of the law by this court in no way conflicts with such statements as those cited in the opposing brief, where the court say: "Power to legislate founded "upon such a reservation in a charter to a private corpora- "tion is certainly not without limit; and it may well be "admitted that it can not be exercised to take away or de- "stroy right acquired by virtue of such a charter, and which "by a legitimate use of the powers granted have become "vested in the corporation; but it may be safely affirmed "that the reserved power may be exercised, *and to almost "any extent, to carry into effect the original purposes of the "grant*, or to secure the due administration of its affairs so "as to protect the rights of stockholders and of creditors, "and for the proper disposition of the assets." 15 Wall., 498.

No body ever claimed that, under the reserved powers in the Ohio constitution, the legislature can take from the corporation, without making compensation, its property duly acquired. That is not this case or question. But the question is whether, when, in 1869, this corporation took from the legislature a franchise to take tolls, it did or did not take it *coupled with a condition*, to wit, the condition stated in the constitution, that the franchise should be subject to the government's reserved right and duty to regulate, and "almost to any extent," these tolls in the interest of the public, and "*in order to carry into effect the original purposes of ths grant*," to wit, the purpose of facilitating and cheapening the commerce and intercourse of the States and their people.

That is the merest begging of the whole question which says the railroad owns the *ad libitum* power to fix its tolls, and that *this* is its property, and as such is incapable of legislative destruction. This court in the passage above cited (16 Wall., 694) carefully and explicitly denies that such is the nature of a franchise taken under the conditions in which this charter was bestowed in 1869; and declares every such franchise, so taken, is taken "subject to be con-

trolled and regulated by the State—its use can be defined, its tolls and rates of transportation may be limited."

The same legal principle here declared by this court, is to be found in Comrs. *vs.* Holyoke, 104 Mass., 451; Sherman *vs.* Smith, 1 Black, 587, Mass. Genl. Hospital *vs.* State Insurance Co. 4 Gray, 227; Mayer *vs.* Norwich and Worcester R. R. Co., 109 Mass., 103, 112, and 113, and in many other cases cited in these.

But a case directly in point, and deciding this very question of the power of the legislature, under such a reservation as is in the Ohio constitution, to *change the rates of toll* which the corporation may charge, is expressly and unanimously decided in the recent case of Parker *et al. vs.* Metrop. R. R. Co., 109 Mass. 506, of which the syllabus is in these words: "The statute of 1846, ch. 229, sect. 26, *limiting the rates of toll* "*to be charged by ferry companies for passengers transported* on "the cars of street railway companies *is constitutional*, and "binds a ferry company *incorporated before its passage*, whose "*charter is liable to alteration or repeal under the Revised Statutes*, "c. 44, § 23. (Genl. Stats., c. 68, § 41.)"

Since this case is exactly the one at bar, in its legal elements, we beg the court's attention to the reasoning of the court, and the authorities cited, pp. 508 and 509.

In Munn *et al. vs.* Illinois, not reported, in an opinion by the Chief Justice, of remarkable force, the conclusion is reached which places all property and franchises which "are affected with a public interest in it," in a legal *status* where the government may, by law, regulate the use and the price of the use thereof; and then in Chicago, Burlington, and Quincy R. R. Co. *vs.* Cutts, decided by this court and not yet reported, the court hold and decide what is expressed by the court in these words: "Railroad companies are carriers "for hire. They are incorporated as such, and given extra-"ordinary powers in order that they may the better serve "the public in that capacity. They are therefore engaged in "public employment, affecting the public interest; and un-"der the decision in Munn and Scott *vs.* The People, just

"announced, are subject to legislative control as to their "rates of fare and freight, unless protected by their charters."

The court then proceeds to declare that "this Burlington "Company, under the charter of the Missouri River Rail- "road Company, was, nevertheless, at all times, *subject to* "*such rules and regulations as the General Assembly of Iowa* "*might from time to time enact and provide.*" "This," says the court, "is in substance its charter, and to that extent it "is protected as by contract." * * * * "Whatever is granted is secured, subject only to the limita- "tions and reservations in the charter, or in the laws or con- "stitutions which govern it."

* * * * * * *

"It was within the power of the company to call upon "the legislature to fix permanently its limit and make it "part of the charter."

* * * * * * *

"If that had been done the charter might have presented "a contract against future legislative interference. But it "was not, and the company invested its capital, relying upon "the good faith of the people and the wisdom and impar- "tiality of the legislators for protection against wrong under "the form of legislative regulation.

"It is a matter of no importance that the power of regula- "tion now under consideration was not exercised for more "than twenty years after this company was organized. A "power of government which actually exists is not lost by "non-user."

Here, then, is a decision of a case substantially identical with the one at bar. There the railroad company held its charter "subject, nevertheless, at all times to such rules and "regulations as the General Assembly of Iowa might, from "time to time, enact and provide."

In the case at bar the Lake Shore and Michigan Southern Company, which acquired its corporate existence in 1859, from and in virtue of the act of April 10th, 1856, and ac- quired such charter and franchises, "subject to such rules

and regulations as the General Assembly of" Ohio "might, from time to time, enact and provide"—these franchises being so subject to future legislation because the Constitution of 1851 so expressly declared, in requiring that all "special privileges" and all corporations should be subject to be altered, revoked, or repealed by the General Assembly at its pleasure.

The case therefore of the Chicago, Burlington and Quincy Railroad Company against Cutts, just decided by this court, is a direct and conclusive authority in support of the proposition we are now upon, namely: that the rate of fares which a railroad company may charge against the public is one of those franchises which may be regulated and limited by the Legislature, unless the charter plainly prohibits such regulation; and that in cases like the one at bar, where the corporation was granted under a constitution which reserves to the Legislature the power to alter, revoke, or repeal the privileges granted in the charters, then and in such case, the power of regulating and limiting the rates of fare is included in the powers reserved to the Legislature.

Here we leave this part of the case.

INDEPENDENTLY OF CONSTITUTION OF 1851, THE ACT OF APRIL 25, 1873, BINDS THE L. S. AND M. S. COMPANY.

We conclude this argument by stating, but without discussing, the propositions bearing upon the point indicated in the charge to the jury, (R., 7,) that even the Cleveland and Toledo Company, which was formed in 1853 by the union under the acts of January 20th, 1851, (R., 7 to 10,) and March 3d, 1851, (R., 15 to 19,) of "The Junction Railroad Company" with the "Toledo, Norwalk and Cleveland Railroad Company," was, by its charter, subject to legislative control as to its fares, as is indicated in said charge to the jury; and as is provided in the 12th section of the general act of 11th of February, 1848, made part of the T., N. and C. Co., (R., 15,) (Swan and Critch., 273,) and as provided in

22d section of the charter of the Junction Company, (R., 14.)

In other words, even had not this Junction Company or this Cleveland and Toledo Company, which are declared to have transmitted their franchises and immunities, through the Lake Shore Company to the "Lake Shore and Michigan Southern," lost their original franchises, and had this "Cleveland and Toledo Company" remained just as it was organized under said act of 20th January and 3d March, it would, in 1873, have been amenable to the legislation contained in the act of 25th April, 1873, in virtue of its own charter, and without reference to the Constitution of 1851.

This is so for the following reasons:

(1) Property and franchises "affected with a public interest ceases to be *juris privati*," and becomes subject to legislative control in the interest of the public. (Wate, Chief Justice, in Munn et al. *vs.* Illinois; cited above.)

(2) Railroad property and franchises are so "affected with a public interest" as to be *prima facie* so subject to legislation; and can only be delivered from such liability by some grant of exemption in its charter. (Wait, Chief Justice, in Chicago, Burlington and Quincy Railroad Company *vs.* Cutts; cited above.)

(3) But such grant of immunity from legislation in the interest of the people will *never* be presumed; and "before "any such exemption or limitation can be admitted the "*intent of the Legislature to confer the immunity or prescribe* "*the limitation must be clear beyond a reasonable doubt.*" (Words of Field, J., in Delaware Road Tax, 18 Wall., 225.)

(4) Not only do *not* the acts of January 20th, 1851, (R., 15 to 19,) and of March 3d, 1851, (R., 7 to 10,) under which this "Cleveland and Toledo Company" was formed, (R., 6,) show beyond a reasonable doubt this grant of exemption from that legislation which is authorized by the 22d section of the Junction charter (R., 14) and the 12th section of the

act of 1848, (cited on 5th page of opposing brief,) and which sections are made part of the C. and T. Railroad charter, (R., 15,) but, on the contrary, the 1st section of the said act of 1851, (March 3d,) under which this "Cleveland and Toledo Company" got all its franchises, (see R., 6,) carefully and explicitly declares, (R., 8,) in regard to any companies which consolidate under this general act, that "such new "corporation shall possess all the powers, rights, and fran- "chises conferred upon such two or more corporations by the "several acts incorporating the same, or relating thereto re- "spectively; *and shall be subject to* ALL THE RESTRICTIONS and "perform all the duties imposed by such acts, so far as the "same may be consistent with the provisions of this act."

But some of the "restrictions" to which said Junction charter was subject were those in the 22d section, authorizing the Legislature to reduce fares after ten years; and some to which the T., N. and C. Railroad charter was subject were those in said 12th section of act of 1848, authorizing the Legislature to do the same thing as to this T., N. and C. Railroad charter.

So that these companies, by accepting and consolidating under said act of 3d March, 1851, expressly accepted the provisions of *that* act, and agreed to be subject to the said "RESTRICTIONS" in said sections 22 and 12.

So that, instead of this grant of immunity appearing "beyond doubt," it is prohibited "beyond doubt."

(5) It is replied to this last that the 12th section of the act amending the charter of this T., N. and C. Company (R., 18) omits section 22 of the "Junction" charter, as not being applicable to the charter which was to be created by the consolidation of the said T., N. and C. Company with the Junction Company. This is true; but is utterly insignificant when it is observed that the consolidation was *not* effected under this act of 20th of January *alone*, if at all; but *was* accomplished under the *later* act of 3d March, 1851, which would, wherein repugnant, repeal the act of 20th of

January. And note most carefully the wording of this 1st section of act of March 3d, 1851, (R., 8.) The "restrictions" to which the new companies consolidating under it were to be subject were "ALL THE RESTRICTIONS" contained in the "*several acts incorporating*" the companies so consolidated. The 22d section of the act of 2d March, 1846, (R., 14,) was *one* of these "all restrictions" contained in the "act incorporating" this Junction Company; and hence, manifestly, this "Lake Shore and Michigan Southern Company," even had it not been created under the Constitution of 1851, would have inherited from its ancestor, "The Cleveland and Toledo Company" the "restriction" contained in this 22d section.

We omit to reply specifically to the propositions in Mr. Mason's able argument, simply because the propositions we have herein sought to establish are a complete reply to all.

SHELLABARGER & WILSON,
for The State of Ohio.

To the Supreme Court of the United States

JOSEPH SHIELDS,
vs.
THE STATE OF OHIO.

Petition in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES MASON,
Attorney for Plaintiff.

To the Supreme Court of the United States

JOSEPH SHIELDS,
vs.
THE STATE OF OHIO. } PETITION IN ERROR.

This case originated in the Court of Common Pleas of Lorain County, Ohio, by an indictment against Shields for assault and and battery. Shields was acting as conductor on one of the passenger trains of the Lake Shore & Michigan Southern Railway Company, on its railroad between Elyria and Cleveland. Ulrich, the prosecutor, was a passenger on the train wishing to go from Elyria to Cleveland, a distance of about twenty-five miles.

The regular fare which the Company fixed, and which it required the conductor to collect, was ninety cents. Ulrich offered him seventy-five cents, and refused to pay more than that sum; being equal to three cents per mile. In consequence of his refusal to pay the required fare, or more than three cents per mile, Shields ejected him from the cars.

It was not pretended that Shields was guilty of an assault if the Company had the right to charge more than three cents per mile, and the question is, is it shielded by its charter from the operation of the Act of April 25th, 1873, to "amend section 13 of an Act to provide for the creation and regulation of incorporated companies in the State of Ohio, passed May 1, 1852?"

This Act provides that "Such corporation or any corporation

operating a railroad in whole or in part in this Sate may demand and receive for the transportation of passengers on said road not exceeding three cents per mile," &c.

The Lake Shore & Michigan Southern Railway Company is formed by the consolidation of several original companies under the acts of the Legislature hereinafter referred to.

The passenger in this case was traveling over a portion of that part of the Railroad constructed under the charter of the Junction Railroad Company.

The Junction Railroad Company was chartered March 2d, 1846, to construct a railroad from Cleveland, Ohio to Elyria, in Lorain county, thence West.

On the 7th of March, 1850, another company designated as the Toledo, Norwalk & Cleveland Railroad Company, was chartered to construct a railroad from Cleveland to Toledo. In 1853, these two companies were consolidated into a company designated as The Cleveland & Toledo Railroad Company, under power conferred by the 12th Section of an Act passed January 20th, 1851, amending the charter of the said Toledo, Norwalk & Cleveland Railroad Company. See page 18 of the Record. By virtue of this amendtory act, and of the agreement of consolidation in pursuance thereof, the consolidated Company was to be governed by certain sections of the charter of the Junction Company specified in said 12th Section, one of which is as follows:

SECTION 11. That said Corporation may demand and receive from all persons traveling upon said road, or for the transportation of property, such rate of toll as the said corporation may think reasonable.

It is claimed in behalf of Plaintiff in Error that the Lake Shore & Michigan Southern Railway Company succeeding to the rights and franchises thus originally conferred upon the Junction Company, and then transferred to the Cleveland & Toledo Company,

is authorized by the said franchise to charge such rates of fare or toll over this part of its railroad as it may think reasonable, and that the said Act passed by the Legislature of Ohio, April 25, 1873, is void as to this right and franchise of said Lake Shore & Michigan Southern Railway Company, and is as to said rights and franchises repugnant to the Constitution of the United States in that it "impairs the obligation of contracts."

In avoidance of this conclusion it is claimed on behalf of the State of Ohio that subsequent to the Constitution of Ohio, adopted in 1851, The Cleveland and Toledo Railroad Company availed itself of the provisions of an Act passed by the Legislature of Ohio April 10th, 1856, entitled "An Act to authorize the consolidation of railroad companies," &c., and that under said Act the existing Lake Shore and Michigan Southern Railway Company was organized. That by virtue of said consolidation under said Act it became a New Corporation. That all its rights and franchises, whenever acquired, were subject to alteration and repeal, and that the Legislature of Ohio did not and could not by said Act of 1856, under which said consolidation was made, constitutionally authorize the transfer from the old companies to the new consolidated company, of said franchises and privileges, or any franchises and privileges which it could not confer by General Laws.

The question as to the constitutionality of the provisions of the Act of April 25th, 1873, when applied to this franchise granted to the junction company, and as now held by the existing company, consolidated under the Act of April, 1856, and whether this franchise has by virture of the provisions of said Act survived to the existing company, are the questions presented to this Court.

II.

The errors assigned by plaintiff are: That the Supreme Court of Ohio erred in deciding that the said Act passed April 25th, 1873, in so far as it prohibited the Lake Shore and Michigan Southern Railway Company, notwithstanding the provisions of the charter of said Junction railroad company, or those incorporated into the charter of the Cleveland and Toledo Railroad Company, (which company by consolidation under the Act of April 10th, 1856, was merged into the said Lake Shore and Michigan Southern Railway Company,) was of binding force and validity against said consolidated company, and not repugnant to the Constitution of the United States, or to Article 1 and Section 10 of the same?

III.—ARGUMENT.

1st. The right conferred upon the Junction company under Section 11 of the Charter to "demand and receive from all persons traveling upon said road or for the transportation of property, such rates of toll as the corporation may think reasonable," was its most essential and valuable right and franchise.

In providing for the consolidation of the Junction with the Toledo, Norwalk and Cleveland Railroad Company, this right and franchise was deemed preferable to the franchise held by the latter company, and was for that reason specially engrafted upon the charter of the new company to be formed by the consolidation of these two companies.

To understand fully the purpose of the Legislature in engrafting upon the new company, which was to be formed by consolidating these two companies, certain sections of the charter of the Junction company, to-wit, Sections 9, 10, 11, 15 and 17, and the provision that in other respects said consolidated company shall be governed by laws applicable to the Toledo, Norwalk and Cleve-

land Railroad Company, should be noticed. I refer the Court to the provision of the charter of the latter company corresponding with said Section 11. It is Section 12 of the Act regulating railroad companies passed February 11th, 1848, referred to on page 15 of the record, and is on page 273, *Swan and Critchfield*, Ohio Statutes, and is as follows:

"Such corporation may demand and receive for the transportation of passengers on said road, not exceeding three and a half cents per mile, and for the transportation of property not exceeding five cents per ton per mile, when the same are transported a distance of thirty miles or more; and in case the same are transported for a less distance than thirty miles, such reasonable rate as may be from time to time fixed by said company; at any time after the expiration of ten years, from the time any such road may be put in operation, it shall be lawful for the General Assembly to prescribe the rates to be charged for the tranportation of persons or property upon said road, should they be deemed too high, and may exercise the same power ten years thereafter; Provided, that no reduction shall be made, unless the net profits of the company, on an average for the previous ten years, shall amount to a sum equal to ten per centum per annum upon its capital, and then not so as to reduce the future probable profits below the said per centum."

I also refer to Section 22 of the Junction charter, on page 14 of the record, which is as follows:

"After the lapse of ten years from the completion of said road, the State shall have the power to reduce the tolls upon said road, should they be unreasonably high, and exercise the same power at intervals of every ten years thereafter."

The Legislature intended to grant and did grant to the company to be formed by consolidation of these two companies the right specified in said Section 11—relieved from the condition

which had attached to each of the original corporations that after ten years the Legislature should have power to reduce rates.

I cite but few authorities to sustain, or rather to illustrate the proposition that the franchise specified in said Section 11 constituted a contract.

In 6th Pa. St. Rep., 379, Monongahela Navigation Company vs. Coon, Mr. Justice Gibson says: "A charter is essentially a contract between the State and the agent, and the principle needed not the decision in the Dartmouth College case to establish it. The wonder is that it happened to be controverted."

Bouvier says: "A franchise is a privilege conferred by grant from the government and vested in individuals." "It must be conceded that all which goes to the constitution of the corporation and its beneficial operation is granted by the Legislature and cannot be revoked either directly or indirectly without a violation of the grant, which is regarded as impairing the obligation of the contract, and is prohibited by the United States Constitution. And if we suppose the Legislature to have made the same grant to a natural person which they did to defendants, which they may undoubtedly do, it would scarce be supposed that they thereby parted with any general legislative control, over such person or a the business secured to him. Such a supposition when applied to single natural person, sounds most absurd; but it must, in fact, be the same thing when applied to a corporation however extensive. In either case the privilege of operating the road, and taking to"s and fare or freight, is the essential franchise conferred. Any Act *essentially paralyzing* the franchise or *destroying the profits* therefrom arising would no doubt be void." (27 Vt. Rep., Thorp vs. R. & B. R. Co.)

2nd. The important question in this case, I assume to be not what franchise the Cleveland and Toledo Company held before it was consolidated in 1869 into the existing company, but whether

this franchise as then held by that company has survived the consolidation and is still, or was at the date of the passage of the Act of April 25th, 1873, a binding and subsisting contract?

The Act of April 10th, 1856, under which this consolidation was made. See Swan and Critchfield, Ohio Statute, page 327, in Sec. III. provides as follows:

"Upon the making and perfecting the agreement and Act as provided in the preceding section, and filing the same or a copy with the Secretary of State, the several corporations, parties thereto, shall be deemed and taken to be one corporation, possessing within this State all the rights, privileges and franchises, and subject to all the restrictions, disabilities and duties of such corporation of this State so consolidated."

Section V. "Upon the election of the first board of directors of the corporation created by said agreement of consolidation, and by the provisions of this Act, all and singular the rights, privileges and franchises of each of said corporations, parties to the same, and all the property, real, personal and mixed, and debts due on account of subscriptions of stock or other things in action, shall be deemed to be transferred and vested in such new corporation without further act or deed, and all property, all rights of way, and all other interests, shall be as effectually the property of the new corporation as they were of the former corporations, parties to said agreement; and the title to real estate, either by deed, gift, grant, or by appropriations under the laws of this State, shall not be deemed to revert or be impaired by reason of this Act; Provided, that all rights of creditors, and all liens upon the property of either of said corporations, shall be forever unimpaired, and the respective corporations may be deemed to be in existence to preserve the same; and all debts, liabilities and duties of either of said companies shall thenceforth attach to said new corporation, and be enforced against it to the same ex-

extent as if said debts, liabilities and other duties had been contracted by it."

That the Legislature *intended* that this franchise which was a vested right, in the original corporation; and that it agreed that it should survive the consolidation, and be transferred and vested in the consolidated corporation, and should become as "effectually the property of the new corporation as they were of the former corporation," is about as clearly manifested and expressed as language can express it.

No creditor of one of the original corporations would be troubled with any doubt lest the language of the last section should not with sufficient clearness impose upon the new corporation all the *debts*, *liabilities* and *duties* of the original company, which contracted his claim, and it would seem that its rights, privileges and franchises are with equal explicitness preserved to its successor. Of this intention on the part of the Legislature, I assume that there can be no room for doubt.

3d. The mode of reasoning by which the conclusion is claimed by the State to be justified that this franchise of the Junction company does not appertain to the Lake Shore and Michigan Southern Railway Company is, That by the consolidation a new corporation was created. That such new corporation must necessarily receive all its rights and powers directly from the Legislature. That all the rights and franchises this consolidated company does or can possess were derived from the Act of 1856, which authorized the consolidation, and are just as much subject, irrespective of the vested rights possessed by the original companies to the legislative power of alteration, amendment or appeal, as if created under the general railroad laws of Ohio of 1852. That this consolidated corporation came into being under the Constitu-

tion of 1851, and from necessity became subject to the 2nd Section of Article XIII, which is as follows:

Section 2. "Corporations may be formed under General Laws; but all such laws may from time to time be altered or repealed."

Waiving all discussion of the question whether this consolidated company is or not in a full sense a *new* corporation, and as such liable to consequences under the Constitution of 1851, as the natural and necessary inheritance, I inquire, is it correct to say that it received its right and power *from the Legislature* under the Act of 1856?

Certainly no such inference can be drawn from the language and terms of the Act itself.

It does not profess to be the source from which such rights are to be derived, but distinctly provides that they shall be deemed to be transferred and vested without further act or *deed*.

To assume that the rights and franchises which the consolidated company could receive must be derived from the Act of 1856, which authorized the consolidation is to assume that the Legislalature had no power to do what it by said Act undertook to do, to-wit, to authorize two or more companies to unite themselves into one, retaining or transferring to that company the rights and franchises which they possessed. That from the terms of the Act the stock-holders would be induced to suppose they were not *surrendering* rights of property and franchises, but were continuing and merely transferring them to be held by the same secure title as held before, would seem obvious. Two-thirds of the stock-holders can compel such consolidation against the opposition of one-third, but it would contravene all our ideas of the power of any majority of share-holders in a corporation, to assert that they could compel a minority to surrender their property or valuable rights. I submit to the Court that the Legislature clearly *agreed* with those stock-holders, whether this be a new corpora-

tion or not, that it should hold as transferred to it the *same powers, rights and franchises* which were held by the original companies.

On what provisions of the Constitution is the assertion that the Legislature had no power to authorize what it evidently proposed to authorize, to-wit, a consolidation of existing powers and franchises into a new corporation? The only appropriate provisions are in Article XIII, and as follows:

Section 1. "The General Assembly shall pass no special Act conferring corporate powers."

The Act of 1856 is a general Act.

Section 2. "Corporations may be formed under general laws; but all such laws may from time to time be repealed."

There is no other provision which affects the question of power. The 3d section provides for individual liability of all stock-holders in a corporation, but in no manner bears upon the question under discussion, and the inquiry is narrowed down to the consequences upon this consolidated corporation of the provision that "all such laws may from time to time be altered and repealed."

Let us accept as a consequence of the constitutional provision the alteration or repeal of this Act of 1856, under which these original companies were consolidated or formed into a *new* corporation, what in that event is the condition of the owners of the corporation, or the corporation itself?

Is the corporation organized by consolidation under that Act destroyed? If it be true that this right to charge fare and tolls which was originally granted to the Junction company is a franchise or property which became engrafted upon the charter of the consolidated company, and that such franchise appertaining to its charter had become the *property* of the stockholders who owned the corporation, is it true that the repeal of the law under which the consolidation of these interests was made, divests all

property or interest in such franchise, and cancels and destroys those rights which were vested and sacred until the consolidation was made? I submit that if we give as full effect to the language of the constitutional provision and to the apparent intent of its framers, the inference is not obvious that franchises and rights acquired which are property are liable to be divested and that without compensation by the repeal of the Act which provided for the creation of the corporation to which they appertain, especially when the terms of the Act so repealed expressly provide for the transfer to such corporation of franchise and rights which were permanent and irrepealable in themselves.

See 23 Pickering, 234, Crease vs. Babcock.

A "charter is exempt from the ordinary action of legislative power beyond the reservation expressed or implied contained in it. In other words, the governmant can rightfully do nothing inconsistent with the fair *meaning* of the contract it has made."

See 13 Gray, Mass. Report, 239–253, Commonwealth vs. Essex County.

"It seems to us this power, *i. e.* to amend or alter, must have some limit! Suppose a manufacturing company incorporated or authorized to erect a dam and flow a tract of meadow, and the owner claim gross damages, which are assessed and paid, can the Legislature afterwards alter the Act of incorporation so as to give to such meadow owners future annual damages."

"The rule to be extracted is this, that where under power in a charter rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the power granted."

In the case above cited the charter in question was created under a general law, "at all times subject to amendment, alteration or repeal at the pleasure of the Legislature." "The repeal of an Act

will not defeat rights vested under it." (13 Rich. (S. C.) Rep., 277.)

Indeed, we perceive but little. if any, utility in a reservation of power to alter or amend, when it strikes us as axiomatic that the Legislature can impose no alteration or amendment upon the trustees without their consent, either with or without their reservation.' (See 15 B. Monroe Rep., 353, Sage vs. Dillard.)

The above was the case to amend reserved in a special charter, See 15 Wallace R., 478, Miller vs. The State, on page 498, Mr. Justice Clifford says: "Power to legislate founded upon such a reservation in a charter to a private corporation is certainly not without limit, and it may well be admitted that it can not be exercised to take away or destroy the rights acquired by virtue of such a charter and which by a legitimate use of the powers granted have become vested in the corporation."

In the case of Holyoke Company vs Lyman, 15 Wallace, 500, Mr. Justice Clifford reiterates the same doctrine on page 519; he says. "Vested rights, it is conceded, can not be destroyed or impaired under such a reserved power!" "The power reserved to the Legislature to alter, modify or repeal the defendant's charter did not purport to authorize the assumption of their property without compensation. No power to do that could have been reserved, for none such could have existed. It would be preposterous to say that the Legislature has the power to make any requisition upon the defendant as a condition of thus retaining their corporate existence." (21 Barb., 518, Miller vs. N. Y. & Erie R. Co.) Let it be conceded for the sake of argument, that the existing corporations can be repealed. Its property or its equivalent is of course returned to its stock-holders. It cannot be given to others or taken by the State. Let us suppose that the enterprise may be extended against the wishes of a minority of the stock-holders, as was done in one or more of the cases referred to in

the cases I have cited, or in regulating the relations of the corporation toward the property through which the railroads pass, or in numerous ways toward community, or in its management, yet there must somewhere be a *limit* as is pointedly remarked by the Court in the above cited case in 13 Grey. I submit that that limit is reached when it comes to a *vested valuable franchise*. All will agree that under such reserved power the corporation can not be deprived of its cars, or of its right of way in land unless appropriated and paid for. Nor can it be divested of any *property*. But its franchise is its property. If the Legislature gave it the absolute and unconditional franchise to charge four cents per mile passage, on its train, and under this alleged constitutional power to alter, it prohibits it from charging more than one cent per mile, and thus renders valueless its road, it has divested it of property. It has destroyed vested rights. If a contract by virtue of the charter existed, it has violated that contract.

If by the terms of the charter, or of the general law which controlled the charter at its inception, it was provided that the Legislature should have the right to fix or regulate the fare it is obvious that such reduction is not a breach of the contract unless unreasonable.

The right to alter and repeal when it exists must then be limited by the terms of the existing contract, as expressed in the general or special Act which creates the corporation, or it must be limited to matters which do not constitute the *property* or *franchise* which is tantamount to property conferred upon the corporation, or the doctrine must be vindicated that the Legislature, when power to alter or *amend the law* is reserved, can rescind, render valueless or *annul* the contract.

It is certainly fair to claim that if this extraordinary power exists when charters have been granted and money invested under them, it must be intelligently expressed in language in the law or

charter or in the constitution. Apply the rule to the case before the Court.

The franchise vested in the Cleveland and Toledo Railroad Company to charge fares; not limited to three cents per mile was given by the Legislature and accepted by the Company. The general Act of 1851 permitted that franchise to be retained after its consolidation with another company.

The general Act of 1856 permitted a further consolidation with a corporation of an adjoining State, and its retention and exercise of the same franchise. This *franchise* still exists.

The consolidated company still lawfully owns and holds it. The laws under which the consolidation was made, whether the same was in fact and in law a *new* corporation or not, were general and may be altered or amended by the Legislature. Is it a part of the contract expressed or implied that it may also revoke these franchises which were not created by, but were only transmitted under the operation of these Acts?

The Act of March 3d, 1851, authorizing railroad companies to consolidate (which Act is still in force) was passed prior to the Constitution of 1851, and rights acquired under it are not liable to be affected by the constitutional right to alter or repeal (see 6 Ohio State, 318, Citizens' Bank of Steubenville vs. Wright. 2d Ohio State, 607, Cass vs. Dillon.) Let us suppose that the Legislature should exercise its utmost power to alter or repeal the Act of 1856, under which the later consolidations were made of the Lake Shore and Michigan Southern Railway Company, it could go no further than to alter or repeal the rights which it gave. But it did not give the franchise now claimed to be controlled and altered. It can only withdraw what is conferred, and however much, in the exercise of the power to alter or repeal this Act, it may affect the consolidation, it can not touch the franchise conferred by Acts *not* of its creation. I submit that by an alteration or repeal of this Act of

1856 is the only means by which this corporation is to be reached under the exercise of the power to alter or repeal; and the Act in question certainly does not profess to affect it.

The decision of the Supreme Court of Ohio in Ohio *vs.* Sherman and others, 22 Ohio, State 411, is referred to as decisive of this case. Let a comparison be made to see if an obvious distinction does not exist. In that case the franchise and property of the original corporation were sold out. A new organization was made and a confessedly new corporation attempted to be formed under the Ohio Act of April 4, 1863.

That all the transferable franchises of the old company, except the franchises *to be a corporation*, could be vested in a new corporation was not denied. But this new organization was not so formed as to render it a corporation which could be created under the constitution of 1851. It lacked, as the court held, one essential and indispensable quality—*i. e.*, shares and shareholders defined and ascertained to which individual liability could attach. The Ohio organization was, therefore, held *not* to be a corporation. The franchise to be a corporation could not pass by a judicial sale, and since a new corporation was not constitutionally created, there was no organization which could hold and exercise these franchises. It is not denied that the Lake Shore and Michigan Southern Railway Company is a legal corporation, and it is conceded that until this Act of April 25, 1873 was passed, it held and could rightfully exercise this franchise as it came to it from the Cleveland and Toledo Railroad Company. The only analogy to be readily discovered between the two cases, as I submit is that it is assumed that in both cases a new corporation is formed or attempted, and that this supposes a surrender of the old franchises to the State and a grant from it of similar franchises to the new corporation. In the case in 22 Ohio State a new corporation in every sense of the term was to be created. The old corporation was, as such, extinct, and the only point decided was

that none was formed to hold or carry the franchises of the old one. In the case before the court it may not be unprofitable to speculate upon the process by which this consolidated company, as a new corporation, must have come into existence. If the process of its creation is to be refined upon, it may be imagined that the old company *surrendered* its existence to its source, and that the new derived its existence by an act of recreation, which act was performed by the Ohio Legislature under the constitution of 1851.

But it will not do to disregard the plain meaning of the language used in the Act passed by that Legislature. It by that Act declared or agreed that the Ohio corporation, to wit., the Cleveland and Toledo Company, or "any railroad company," "whether organized under a general or *special* law" might unite or consolidate itself, carrying with it all and singular the rights, privileges and franchises it held, of which said section was, perhaps, the most important, with companies of adjoining States which were continuous, and that these franchises should be held by those corporations of other States, and the Cleveland and Toledo Company so consolidated "*as effectually*" as they had been by the Cleveland and Toledo Company. It is now claimed that the result of an acceptance by these companies of other States and company of this State is that this right to hold this important franchise by these companies thus united means that they shall be held until the Legislature of Ohio shall choose to annnul it! I submit that such is not the property or franchise these companies which thus consolidated were by the terms of the Act permitted to acquire.

That by a "legitimate use of the power granted," as expressed by Mr. Justice Clifford, the right to this franchise had become vested in this Lake Shore and Michigan Southern Railway Company, and to deprive it of it by legislation is not within the limit of what the Legislature can do under the general power to alter or repeal the Act which it passed.

It could not relinquish its power to alter or repeal the *general law it enacted* which authorized an existing corporation of Ohio to unite with one or more of another State, which corporation it did not create, and the franchises of which were beyond their control. It professed to authorize the union of corporations which existed, not to create corporations. The Act styles the consolidated company a new corporation because it possessed united the powers each had possessed not before possessed by anyone, takes another name, makes a new organization, and covers additional territory. If there is doubt of the power of the Legislature to authorize such a union of existing companies perpetuating the franchises of each as originally possessed if done under the general law. I do not know on what that doubt is predicated, and I submit to the court that the reserved power to alter or repeal such general law does not reserve a power over the franchise which such law did not even profess to confer, but expressly recognized as previously existing and as derived from another source.

The constitution, while it reserves to the Legislature the right to alter or repeal its own grant of chartered rights, did not reserve a right to invalidate contracts between third parties. Whether the conclusion arrived at by this refined process of reasoning is or not logically correct, the plain intent of the Act of 1856, and the understanding of all parties who accepted its provisions and entered into the consolidation must have been, that this valuable purchase was passed to them *just as it existed* with the same rights to a permanent continuance. If the Legislature sees proper to repeal the Act of 1856, or to alter its provisions, it would be exercising a power reserved to it by the constitution. The consequence of such legislation to this company it is not necessary now to consider. But when enabled by nothing except that reserved power, it undertakes, not by means of an alteration or repeal of this act, but by an independent act, to strike out from the charter of this company

its most important franchise, permitted by its laws to be acquired by contract between independent, but contiguous companies, I submit that it has violated a constitutional obligation and encroached upon vested rights.

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